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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 JOHN and JEANNE WHALEN,

12 Plaintiff,

13 v.
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15 UNITED FOOD AND
16 COMMERCIAL WORKERS LOCAL
17 135,

18 Defendant.

CASE NO. 14-CV-3017 W (BLM)

**ORDER GRANTING IN PART
AND DENYING IN PART
DEFENDANT'S MOTION TO
DISMISS [DOC. 3] WITH LEAVE
TO AMEND**

19 Pending before the Court is Defendant United Food and Commercial Workers
20 Local 135's motion to dismiss the Complaint. Plaintiffs John and Jeanne Whalen
21 oppose. The Court decides the matter on the papers submitted and without oral
22 argument. See Civ. L. R. 7.1(d.1). For the reasons discussed below, the Court
23 **GRANTS IN PART** and **DENIES IN PART** the motion [Doc. 3] **WITH LEAVE**
24 **TO AMEND.**
25

26 **I. BACKGROUND**

27 Plaintiffs John and Jeanne are accomplished muralists. (*Compl.* [Doc. 1], ¶¶ 4,
28 9.) They created a mural known as the "Providing The Feast," which was located on

1 Defendant's wall. (*Id.*, ¶¶ 4, 13.) Sometime in November 2013, Defendant ordered the
 2 mural removed without first providing notice to Plaintiffs. (*Id.*, ¶¶ 13–15.) As a result,
 3 the mural was destroyed and Plaintiffs were unable to “document the mural further” or
 4 “speak with the defendant about possibly restoring the mural, removing the mural or
 5 garnering support from the community for the mural.” (*Id.*, ¶ 15.)

6 On December 29, 2014, Plaintiffs filed this lawsuit asserting causes of action for
 7 (1) violation of the Visual Artists Rights Act of 1990 (“VARA”), 17 U.S.C. § 106A,
 8 (2) violation of the California Art Preservation Act (“CAPA”), Cal. Civ. Code §
 9 987(c)(1), (3) conversion, and (4) negligence. Defendant now seeks to dismiss the
 10 Complaint on the ground that (1) Plaintiffs’ state-law claims are preempted by VARA,
 11 and (2) Plaintiffs have failed to state a claim under VARA.

12 13 **II. STANDARD**

14 The Court must dismiss a cause of action for failure to state a claim upon which
 15 relief can be granted. Fed. R. Civ. P. 12(b)(6). A motion to dismiss under Rule
 16 12(b)(6) tests the legal sufficiency of the complaint. See Parks Sch. of Bus., Inc. v.
 17 Symington, 51 F.3d 1480, 1484 (9th Cir. 1995). A complaint may be dismissed as a
 18 matter of law either for lack of a cognizable legal theory or for insufficient facts under
 19 a cognizable theory. Balisteri v. Pacifica Police Dep’t., 901 F.2d 696, 699 (9th Cir.
 20 1990). In ruling on the motion, a court must “accept all material allegations of fact as
 21 true and construe the complaint in a light most favorable to the non-moving party.”
 22 Vasquez v. L.A. Cnty., 487 F.3d 1246, 1249 (9th Cir. 2007).

23 Complaints must contain “a short plain statement of the claim showing the that
 24 the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). The Supreme Court has
 25 interpreted this rule to mean that “[f]actual allegations must be enough to rise above
 26 the speculative level.” Bell Atl. Corp. v. Twombly, 550 U.S. 554, 555 (2007). The
 27 allegations in the complaint must “contain sufficient factual matter, accepted as true,
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1 to state a claim to relief that is plausible on its face.” Ashcroft v. Iqbal, 556 U.S. 662,
2 678 (2009) (citing Twombly, 550 U.S. at 570).

3 Well-pled allegations in the complaint are assumed true, but a court is not
4 required to accept legal conclusions couched as facts, unwarranted deductions, or
5 unreasonable inferences. Papasan v. Allain, 478 U.S. 265, 286, (1986); Sprewell v.
6 Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001).

8 **III. DISCUSSION**

9 **A. Plaintiffs’ state-law causes of action are preempted**

10 Defendant contends that Plaintiffs’ causes of action for violation of CAPA,
11 conversion, and negligence are preempted by VARA’s preemption provision, which
12 provides:

13 On or after [June 1, 1991], all legal or equitable rights that are equivalent
14 to any of the rights conferred by section 106A with respect to works of
15 visual art to which the rights conferred by section 106A apply are
16 governed exclusively by section 106A and section 113(d) and the
17 provisions of this title relating to such sections. Thereafter, no person is
entitled to any such right or equivalent right in any work of visual art
under the common law or statutes of any State.

18 17 U.S.C. § 301(f)(1).

19 The Ninth Circuit uses a two-part test to determine whether a state-law claim
20 is preempted by federal copyright law. Laws v. Sony Music Entertainment, Inc., 448 F.
21 3d 1134 (9th Cir. 2006). The first prong examines if the work in question falls within
22 the scope of the Copyright Act—that is, whether it is an “original work of authorship
23 fixed in any tangible medium of expression.” Id. at 1137; 17 U.S.C.A. § 102. The
24 second prong tests “whether the rights asserted under state law are equivalent to the
25 rights contained in [federal copyright law.]” Id. at 1138.

26 Plaintiffs do not contest that “Providing the Feast” falls under the scope of the
27 Copyright Act, and therefore satisfies the first prong of preemption. Rather, the issue
28

1 is whether Plaintiff's state-claims seek to protect rights that are already protected by
2 VARA.

3 VARA sets forth the right of visual artists to:

4 (A) . . . prevent any intentional distortion, mutilation, or other modification of
5 that work which would be prejudicial to his or her honor or reputation, and any
6 intentional distortion, mutilation, or modification of that work is a violation of
that right, and

7 (B) . . . prevent any destruction of a work of recognized stature, and any
8 intentional or grossly negligent destruction of that work is a violation of that
right.

9 17 U.S.C. § 106A(a)(3). These rights are referred to as the artist's "moral rights," and
10 include the right of "integrity" and "attribution." Cort v. St. Paul Fire and Marine Ins.
11 Companies, Inc., 311 F. 3d 979, 984 (9th Cir. 2002) (citing H.R. REP. NO. 101-514, at
12 5 (1990)).

13 Here, Plaintiffs' CAPA cause of action is based solely on the alleged violation of
14 artistic integrity. Specifically, Plaintiffs allege that Defendant's destruction of the mural
15 constituted a "violation of Plaintiffs' right of integrity, as set forth in Cal. Civ. Code §
16 987." (*Compl.* ¶ 26.) Because, as currently drafted, Plaintiffs' right asserted under the
17 CAPA claim is the same right protected by VARA, the CAPA cause of action is
18 preempted. Similarly, Plaintiff's negligence cause of action seeks to remedy alleged
19 harm to Plaintiffs' "professional reputation." (*Id.*, ¶ 37.) Accordingly, this cause of
20 action is also preempted by VARA.

21 With respect to Plaintiffs' conversion cause of action, it is not based on the
22 alleged violation of Plaintiffs' moral rights, but instead on their "ownership or title
23 rights" to the mural. (*Compl.*, ¶ 30.) However, Defendant cites authority for the
24 proposition that state conversion claims are generally preempted by federal copyright
25 law. See Zito v. Steeplechase Films, Inc., 267 F. Supp. 2d at 1023-24, 1027 (holding
26 that the plaintiff's federal copyright claim preempted his conversion claim because the
27 unauthorized use of the plaintiff's photograph in a documentary "only interfere[d] with
28 [his] intangible property right and [was] equivalent to a claim for copyright

1 infringement). See also Dielsi v. Falk, 916 F.Supp. 985, 987–93 (C.D. Cal. 1996)
 2 (holding that federal copyright law preempted the plaintiff's negligence
 3 claim—stemming from the “essential allegation” that the defendants plagiarized his
 4 television script—because the plaintiff “merely recharacterize[d] a copyright
 5 infringement claim as one for negligence”).

6 Plaintiffs fail to address Defendant's authority. Nor do Plaintiffs cite any
 7 authority suggesting the conversion claim is not preempted. Accordingly, the Court
 8 finds the conversion claim is also preempted.

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 10 **B. Plaintiffs have stated a VARA cause of action.**

11 Defendant argues that Plaintiffs have failed to state a VARA cause of action
 12 because the “Complaint does not explain how the removal of the mural was or would
 13 be prejudicial to their honor or reputation; it simply states a legal conclusion to that
 14 effect.” (MTD [3-1], 7:19–21.) Plaintiffs respond that such specificity is not required.
 15 The Court agrees.

16 As an initial matter, Defendant has not identified any case holding that in order
 17 to state a VARA cause of action, the plaintiff must specify how the removal of the
 18 mural would be prejudicial. (See MTD, 7:10–8:18.) For this reason alone, Defendant
 19 has not satisfied its burden of establishing that Plaintiffs failed to state a VARA claim.

20 Furthermore, there appear to be two formulations for stating a VARA cause of
 21 action. In Martin v. City of Indianapolis, 982 F. Supp. 625, 637 (S.D. Ind., 1997), the
 22 district court instructed that to state a vara claim, the plaintiff must allege (1) he or she
 23 was the authors (2) of a work of visual art (3) within the scope of VARA (4) that was
 24 of recognized stature, and (5) which was intentionally destroyed. Id. at 637, citing 17
 25 U.S.C. § 106A(a)(3)(B). In Scott v. Dixon, 309 F. Supp. 2d 395, 400 (E.D.N.Y.,
 26 2004), the district court stated that a VARA claim required plaintiff to prove (1) the
 27 mural is a “work of recognized stature” and (2) the defendant destroyed the mural in
 28 an intentional or grossly negligent manner. Id. at 400, citing Carter v. Helmsley-Spear,

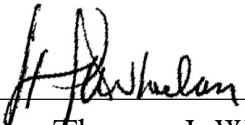
1 Inc., 861 F. Supp. 303, 325 (S.D.N.Y. 1994). Neither formulation requires a plaintiff
2 to specify how the destruction of the “work of visual art” was prejudicial. Moreover, the
3 Court agrees with Plaintiffs’ contention that the Complaint alleges each of the essential
4 elements of the claim. (*See Opp.* [Doc. 4], 6:16–23.) For these reasons, the Court finds
5 Plaintiffs have alleged a VARA cause of action.

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7 **III. CONCLUSION & ORDER**

8 For all the reasons stated above, the Court **GRANTS IN PART** and **DENIES**
9 **IN PART** Defendant’s motion to dismiss [Doc. 3]. Plaintiffs, however, are granted
10 **LEAVE TO AMEND** the CAPA and negligence causes of action to plead a violation
11 of a property right.¹

12 **IT IS SO ORDERED.**

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14 DATED: August 5, 2015

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16 Hon. Thomas J. Whelan
17 United States District Judge
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28 ¹ In allowing leave to amend, the Court is not suggesting that (1) CAPA protects property rights or (2) that CAPA and negligence claims seeking to remedy alleged property rights are not preempted. Neither party’s briefs adequately addressed these issues.